

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON SCOTT RYANS,

Defendant-Appellant.

UNPUBLISHED
November 26, 2019

No. 346127
Cass Circuit Court
LC No. 17-010129-FH

Before: MURRAY, C.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant, Jason Scott Ryans, appeals by delayed leave granted his guilty plea sentence for possession of methamphetamine, MCL 333.7403(2)(b)(i), and possession of marijuana, MCL 333.7403(2)(d).¹ The trial court sentenced defendant to 3 to 20 years' imprisonment for possession of methamphetamine as a second or subsequent offender and 247 days' imprisonment for possession of marijuana as a second or subsequent offender, pursuant to MCL 333.7413(2),² to be served concurrently, and credited defendant for 247 days served. We affirm defendant's convictions but vacate his sentence and remand for resentencing.

This case arose from defendant's possession of controlled substances. During an investigation into possible drug activity at defendant's workplace, Cass County police detectives interviewed five randomly selected employees. Patrick Patterson told the detectives that he had received methamphetamine from defendant. When the detectives interviewed defendant, he

¹ *People v Ryans*, unpublished order of the Court of Appeals, entered December 13, 2018 (Docket No. 346127).

² MCL 333.7413(2) was amended, effective March 28, 2018. See 2018 PA 266. The second or subsequent offender provision under the Public Health Code is now found at MCL 333.7413(1) and includes the same language as 1988 PA 144, the statute under which the trial court sentenced defendant.

admitted to using methamphetamine and gave the detectives a small bag of methamphetamine that he was carrying in his wallet. Defendant also told the detectives that he had a methamphetamine pipe in his lunch box, which the detectives located in defendant's vehicle. During the search of defendant's vehicle, the detectives also found marijuana in the ashtray.

Defendant pleaded guilty to possession of methamphetamine as a second or subsequent offender and possession of marijuana as a second or subsequent offender. The prosecutor dismissed two charges for delivery of methamphetamine, one for possession of methamphetamine with intent to deliver, and the habitual offender sentence enhancement, MCL 769.12, as part of defendant's plea agreement. The trial court scored the minimum sentencing guidelines range; however, at the sentencing hearing, the trial court changed the score for Offense Variable (OV) 12 from five points to 10 points stating:

It's scored at five, and the report indicates that that is scored because of the two priors, but when I look at the Information there's three matters. I've got a Count I that was dismissed of a delivery, I've got Count II, a delivery dismissed, and also a Count V, delivery, and if it's three or more—or if there's three, it would be ten points versus two . . . when I review the Felony Information and the Counts that were dismissed, I believe OV 12 should be scored at ten points as opposed to five.

Defense counsel did not object to the change, stating that he would leave the scoring to the trial court's discretion.

The additional five points assessed for OV 12 increased defendant's minimum sentencing guidelines range from 10 to 23 months' imprisonment to 19 to 38 months' imprisonment for the possession of methamphetamine conviction. The trial court sentenced defendant to 3 to 30 years' imprisonment for his possession of methamphetamine conviction, near the top of the new minimum guidelines range. Defendant later filed a motion for correction of sentence, arguing that he was entitled to resentencing because the trial court erred in assessing 10 points for OV 12, and defense counsel provided ineffective assistance by not objecting to the scoring of OV 12 at sentencing. The trial court denied defendant's motion.

Defendant claims on appeal that the trial court erred in scoring OV 12. We agree.

The trial court must support its factual determinations by a preponderance of the evidence, and this Court reviews those determinations for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

Only felonious acts that occurred within 24 hours of the sentencing offense and will not result in separate convictions should be scored as contemporaneous acts under OV 12. MCL 777.42(2)(a). The trial court may assess 10 points for OV 12 if the defendant committed three or more contemporaneous felonious acts, five points if the defendant committed two contemporaneous felonious acts, one point if the defendant committed one contemporaneous felonious act, and zero points if the defendant committed no contemporaneous felonious act. MCL 777.42(1)(c), (e), (f), and (g). "A trial court determines the sentencing variables by

reference to the record, using the standard of preponderance of the evidence.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The trial court does not err in assessing points under OV 12 when there is sufficient evidence on the record to determine that a defendant committed the requisite felonious acts within 24 hours of the sentencing offense. See *People v Waclawski*, 286 Mich App 634, 687; 780 NW2d 321 (2009).

In this case, the trial court relied on the dismissed charges found in the amended information to support its score of 10 points for OV 12. However, there is little to no evidence on the record that any of the dismissed charges occurred within 24 hours of when the detectives found defendant in possession of methamphetamine. Although the amended information was dated May 4, 2017, and provided that “on the date and at the location described above, the defendant” committed each crime listed, this conclusory statement alone is not sufficient to satisfy the preponderance of the evidence standard. See *Osantowski*, 481 Mich at 111.

The only evidence that defendant delivered or intended to deliver methamphetamine is Patterson’s statements that he received methamphetamine from defendant. However, it is unclear when that delivery actually occurred. Without more information it cannot be determined by a preponderance of the evidence that defendant’s alleged delivery to Patterson occurred within 24 hours of defendant’s possession of methamphetamine on May 4, 2017. See *Osantowski*, 481 Mich at 111. The evidence on the record in this case does not support the conclusory statement in the amended information that all the charged offenses occurred on the same date. See *Waclawski*, 286 Mich App at 687.

Because the record does not support a finding that three or more contemporaneous felonious acts occurred within 24 hours of the sentencing offense, the trial court erred in assessing 10 points for OV 12. The proper score for OV 12 was zero points because the record does not demonstrate by a preponderance of the evidence that any of the dismissed offenses relied upon by the trial court occurred within 24 hours of the sentencing offense.³ This lowers defendant’s minimum sentencing guidelines range from 19 to 38 months’ imprisonment to 10 to 23 months’ imprisonment. See MCL 777.65. Because the basis of defendant’s sentence is an inaccurate calculation of the guidelines range, we vacate defendant’s sentence and remand for resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Having already determined that a remand is necessary for resentencing under the properly scored minimum guidelines range, we find no further remedy is available based on a claim of ineffective assistance of counsel. Thus, defendant’s ineffective assistance of counsel claim is moot, and we need not address it. See *People v Jones*, 317 Mich App 416, 431-432; 894 NW2d 723 (2016).

³ However, even assuming that the statements in the PSIR support a finding that the alleged delivery to Patterson occurred on the same day as the detectives’ interview of defendant and defendant’s possession of methamphetamine, we note that the delivery of methamphetamine would only constitute one contemporaneous felonious act. These facts, if they occurred on the same day, would support an assessment of one point for OV 12, rather than 10 points. See MCL 777.42.

We affirm defendant's convictions, vacate defendant's sentence, and remand this matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Jane M. Beckering